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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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NO. PD-590-21

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
11/3/2021
DEANA WILLIAMSON, CLERK

NOEL CHRISTOPHER HUGGINS,
Appellant

v.

THE STATE OF TEXAS,
Appellee

From the 10th Court of Appeals, Waco
Cause No. 10-19-00096-CR

BRIEF FOR APPELLANT

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Identity of Judge, Parties and Counsel

Appellant, pursuant to Rule of Appellate Procedure 38.1(a) and 68.4(a), provides the following list of all parties to the trial court's judgment and the names and addresses of all trial and appellate counsel.

THE TRIAL COURT:

Hon. Lee Harris — Trial Court Judge
66th District Court, Hill County
P.O. Box 284
Hillsboro, Texas 76645-0284

THE DEFENSE:

Noel Christopher Huggins — Appellant

Gregg W. Hill — Former Trial Counsel for Appellant
P.O. Box 1096
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THE PROSECUTION:

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Assistant District Attorney — for the State

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District Attorney, Hill County
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Statement of the Case

Appellant Noel Christopher Huggins chose to represent himself at a pretrial hearing a month before trial. When he changed his mind on the day of trial and asked for appointed counsel, the trial court denied his request. He pleaded guilty to possession of methamphetamine. The court sentenced him to 18 years' imprisonment. The court of appeals affirmed, rejecting Appellant's contentions that the trial court denied him the statutory right to withdraw his waiver of counsel "at any time" and failed to admonish him about the dangers and disadvantages of self-representation.

Statement Regarding Oral Argument

The Court has advised the parties that oral argument will not be permitted.

Grounds Presented

1. Is the statutory right to withdraw a waiver of counsel under article 1.051(h) absolute or subject to restrictions?

2. What admonishments does *Faretta* (or article 1.051) require for a defendant who initially contests guilt but later pleads guilty?

3. Did the court below correctly conclude that no *Faretta* admonishments were required where Appellant initially contested his guilt?

Statement of Facts

The State secured an indictment against Huggins for possessing less than a gram of methampetamine. (CR4)

The indictment alleged 2 prior non-state-jail felony convictions to enhance the punishment for the offense to that for a second-degree felony. (CR4) See TEX. PEN. CODE § 12.425(b). The first of these was a 1993 Utah conviction for rape. The second was a 2014 Hill County conviction for failure to comply with sex offender registration. (CR4)

At a pretrial hearing a little over a month before trial,[1] appointed counsel advised the court that Huggins wanted to represent himself. (3RR4) Then the following occurred:

Court: Okay. Mr. Huggins, at this time you wish to represent yourself in this matter; is that correct, sir?

Huggins: Yes, sir.

Court: All right. You understand that, just as we've done here, the Court appointed you a lawyer and found that you were indigent, and that just as the Court will appoint you a lawyer, the Court will let you represent yourself, as long as that's the decision that you

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[1] During the 2 years the case remained on the docket, the trial court conducted several hearings regarding whether Huggins desired to represent himself.

are making, so we will proceed with getting a—where are those Waivers of Counsel? I'll have to get one out of my office. I'll get a written Waiver of Counsel and get it to you in just a minute.

Huggins: Okay.

Court: If you'll sign that, then I'll let you proceed on your own.

Huggins: Okay. Are we going to continue this to March 7th?

Pratt: I believe the trial date in March is—

Court: I don't know what the trial date is.

Huggins: Yeah, I don't want to—I don't want—I would like to have a continuance. I don't want to sign for trial yet because I want to be able to file some motions with the Court.

Court: There's plenty of time between now and then to file motions.

Huggins: Well, I'm not an attorney, so it's going to take me a minute.

Court: All right. What we—first thing we've got to do is get this—

Huggins: Do you know if my writ of certiori [sic] has been granted through the court last week?

Court: Your what, Mr. Huggins?

Huggins: I sent a writ of habeus [sic] corpus in last week to Angelia Orr, the clerk of the Court.

Court: I haven't seen it. I'll look in the file and see.

Huggins: Thank you, sir.

Pratt: March 11th is the trial date, Your Honor.

Court: Mr. Huggins, the Court will—I don't know whether we will get to you or not, but I'm going to start setting it on trial dates.

Huggins: Yeah, I won't be ready by March 11th, sir. I'm—I need—I'm going to file an appeal to the motions to the appellate court.

Court: All right. Here's a Waiver of Counsel. Read over that, if you'll get that signed, get it back to me.

Huggins: I've read it before.

Court: Oh, that's right. You've seen that before.

Huggins: Yeah.

Court: All right. At that point, you can file whatever you'd like.

Huggins: (Reading to himself.)

Court: All right, sir. Thank you, sir. You can be seated. At this point you can proceed on your own and file whatever you like. I'll send notices directly to you.

(3RR4-7)

At this hearing, Huggins signed a written waiver of counsel that provides in relevant part:[2]

> On this the 7 day of Feb, 2019, I have been advised by the above named Court of the following:

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[2] Rather than reprinting the entire document here, a complete copy of the waiver of counsel is included in the Optional Appendix and incorporated herein by reference.

(1) The right to represent myself in a criminal proceeding and the dangers and disadvantages of self-representation; and

(2) My right to representation by counsel in the trial of the charge pending against me. I have been further advised that if I am unable to afford counsel, one will be appointed for me free of charge, save and except that, if the Court determines I have sufficient financial resources, the Court shall order me to pay all or part of the legal services provided, including expenses and costs.

I fully understand my rights in (l) and (2) above and, having no further questions about them, I hereby knowingly and intelligently waive (2) above; my right to representation by counsel, and request the Court to proceed with my case without an attorney being appointed for me.

I hereby waive my right to counsel.

. . . .

I further acknowledge that I have been fully advised of the right to counsel for purposes of entering a guilty plea or proceeding to trial, and the Court has advised me of the nature of the charges against me and, if I desire to proceed to trial, the dangers and disadvantages of self-representation. I further acknowledge that the court has provided me with a statement substantially in the following form, which, if signed by the defendant, shall be filed with and become a part of the record of the proceedings:

"I have been advised this 7 day of Feb 2019, by the 66th District, County Court at Law or County Court of Hill County, Texas as applicable of my right to representation by counsel in the case pending against me. I have been further advised that if I am unable to afford counsel, one will be appointed for me free of charge. Understanding my right to have counsel appointed for me free of charge if I am not financially able to employ counsel,

> I wish to waive that right and request the Court to proceed with my case without an attorney being appointed to me. I hereby waive my right to counsel."
>
> . . . .

(CR12-13)

The trial was set to commence on March 11, 2019. After reviewing qualifications and exemptions with the venire panel, the court conducted a hearing outside the presence of the jury. Huggins then advised that he wished to waive his right to jury trial and enter a guilty plea. (5RR28) Then the State began to recite the various provisions of the jury waiver document and whether some of those would be waived because of Huggins's open plea. (5RR30-31)

The court advised Huggins that he would not waive his right to appeal by pleading guilty and the court would appoint appellate counsel if he so desired. (5RR31) Then the following ensued:

Huggins: What about having an attorney right now?

Court: You've already made a choice not to have an attorney.

Huggins: This is like way above my pay grade.

Court: I tried to tell you that twice. You didn't listen to me.

Huggins: So I can't have an attorney now?

Court: No, sir, not at this stage. But you can certainly appeal, based on the fact that you didn't have one, if you want to.

(5RR31-32)

Huggins pleaded "guilty" to the primary offense and "true" to the allegation of a prior felony conviction in Utah. (5RR40) He pleaded "not true" to the allegation of a prior felony conviction in Texas. (5RR40-41) The court confirmed Huggins's intention to waive his right to a jury trial on punishment. The court found him guilty and found the Utah enhancement allegation true. (5RR42) After accepting Huggins's pleas, the court recessed the case until the following morning for the sentencing hearing.

At the commencement of the sentencing hearing, when the court informed Huggins that he must allow his fingerprints to be taken at the State's request, Huggins objected on Fifth Amendment grounds. The court explained that the Fifth Amendment did not prevent the State from having him fingerprinted. Then the following ensued:

Huggins: I don't understand that. I need an attorney.

Court: Mr. Huggins, I gave you two attorneys. You got rid of both of them. You waited until I had 61 people—actually, I started with 71 people in this courtroom and decided you didn't—suddenly then you wanted to plead guilty because you wanted to jack the system around.

Huggins: I don't want to jack the system around.

Court: I went ahead and went along with it. State waived its right to a jury trial. You waived your right to a jury trial. Guilt/innocence is over with; we're now going into punishment.

Huggins: Nobody has told me what the fingerprints are for, so I need an attorney to advise me of my rights, if I have to do this or if I have to go through it.

Court: You have to do it.

Huggins: Penalty phase doesn't have to do with fingerprints. I asked for fingerprints three weeks ago and you denied it and now you want a fingerprint. That doesn't make sense to me.

Court: Well, what I'm telling you is, they are for the punishment phase of the trial. They're entitled to be taken. You are going to provide these fingerprints. You can provide them or I'll get enough people up here that you're going to provide them. I don't care how you do it.

Huggins: I'm not going to be defiant. I just want to know what my rights are.

Court: They are for punishment purposes. It's not testimonial. You do not have a right to avoid it. If you had a lawyer here, they'd tell you to provide the fingerprints.

Huggins: Well, I'm going to go ahead and do it, but I'm going to do it against my will.

Court: All right. We've got that on the record. The court reporter took it down. It's against your will. And if you want to appeal on that basis, that's fine. You can appeal it until it's not any bigger than a potato for all I care.

(6RR6-8)

Huggins requested counsel several more times during the sentencing hearing. (6RR57,80,86-87,89)

The State offered evidence to prove up the second enhancement allegation.

The trial court found the second enhancement allegation to be true and sentenced Huggins to 18 years' imprisonment. (CR60-61), (6RR105)

Summary of the Argument

The old proverb—"He who is his own lawyer, has a fool for his client," THE MACMILLAN BOOK OF PROVERBS, MAXIMS, AND FAMOUS PHRASES 1370 (1965)—is based on experience and is not just some trite saying. However, the Sixth Amendment confers a right of self-representation so long as the defendant is admonished about the dangers and disadvantages of self-representation.

Article 1.051 likewise recognizes the right of self-representation. However, article 1.051(h) provides that a defendant who has waived counsel and chosen to represent himself may withdraw that waiver "at any time." Here, the trial court refused to allow Noel Huggins to withdraw his waiver on the day of trial. The court below erred by upholding this refusal to follow the plain meaning of the statute and by engrafting additional restrictions on the statutory right to withdraw a waiver of counsel at any time.

In *Faretta*, the Supreme Court recognized the Sixth Amendment right of self-representation and held that a defendant who desires to represent himself must be admonished of the dangers and disadvantages of self-representation so he makes that choice with "eyes open."

Here, the trial court wholly failed to admonish Huggins about the dangers and disadvantages of self-representation at the pretrial hearing where he waived counsel. Because Huggins pleaded guilty a month later on the day of trial, the court below (relying on decisions from this Court—*Johnson* and *Hatten*) held that *Faretta* does not apply because he did not contest his guilt.

However, *Johnson* and *Hatten* appear to be in conflict with the Supreme Court's decision in *Tovar* that *Faretta* applies even when a defendant pleads guilty—though the admonishments required need not be as extensive as for a defendant who contests guilt.

Further, the scope of admonishments required by *Faretta* necessarily turns on the circumstances of the hearing at which a defendant informs the court that he desires to represent himself. Here, that occurred at a pretrial hearing where all indications were that Huggins intended to contest guilt and have a trial on the merits. The trial court thus erred by failing to properly admonish him. And the court below erred by applying a post hoc analysis to excuse the trial court from the requirements of *Faretta* based on events that happened over a month after Huggins chose to waive counsel and represent himself.

Argument

1. Is the statutory right to withdraw a waiver of counsel under article 1.051(h) absolute or subject to restrictions?

Article 1.051(h) of the Code of Criminal Procedure provides that a defendant who has waived counsel and chosen to represent himself may withdraw that waiver of counsel "at any time." The court below failed to apply the plain meaning of the statute by holding that the trial court had properly refused to permit Huggins to withdraw his waiver. The trial court's refusal was error that affected Huggins's substantial rights.

A. Article 1.051 and *Faretta* provide distinctive rights and procedures

For each of the issues presented, it is important to begin with the understanding that the Sixth Amendment right to self-representation and the statutory right to self-representation are distinctive rights with distinctive procedures established for their implementation.

The Supreme Court held in 1975 that a defendant has a Sixth Amendment right to self-representation. *Faretta v. California*, 422 U.S. 806, 834-35 (1975). A body of case law has developed over the last 40-plus years defining that constitutional right, how it is to be effectuated, and how it may be withdrawn.

Conversely, the Texas Legislature codified a statutory right of self-representation in 1987 with the enactment of article 1.051. Act of May 30, 1987, 70th Leg., R.S., ch. 979, § 1, 1987 Tex. Gen. Laws 3321, 3321-22 (amended 2001). Article 1.051 establishes its own procedures for effectuating the statutory right of self-representation and terminating it by withdrawing the waiver of counsel. Notably, the procedures for withdrawal of a waiver of counsel under article 1.051(h) have not changed since the enactment of the statute despite numerous other amendments over the years.

A useful parallel may be drawn here to the Texas exclusionary rule of article 38.23 which is distinctive from the federal exclusionary rule established by the Supreme Court. This Court's decision in *McClintock* provides a useful template for the construction and application of article 1.051.

> While Article 38.23 to some extent "mirrors" the federal exclusionary rule, they are not identical, and we are not free to graft additions or alterations to the statute at our pleasure, in the name of policy, that are plainly inconsistent with the text. The proper scope of Article 38.23(a)'s exclusionary rule is a question of statutory construction.

McClintock v. State, 541 S.W.3d 63, 66-67 (Tex. Crim. App. 2017) (citation omitted).

This is precisely how the Court should approach the statutory right of self-representation provided by article 1.051.

B. Article 1.051 supplements *Faretta* and the Sixth Amendment

Recognizing that the Sixth Amendment right of self-representation and the statutory right of self-representation codified in article 1.051 are distinct raises the question of how these rights interact. Huggins suggests that the Sixth Amendment right recognized by *Faretta* and expanded upon in subsequent cases establishes the constitutional minimum for the right of self-representation while the rights and procedures codified in article 1.051 expand upon the constitutional right to the extent they are distinctive.

As the Supreme Court of the United States has observed, "States are free to adopt by statute, rule, or decision any guides to the acceptance of an uncounseled plea they deem useful." *Iowa v. Tovar*, 541 U.S. 77, 94 (2004). This principle of federalism applies equally to pro-se defendants who plead guilty as to those who contest their guilt and represent themselves in a trial on the merits.

C. The plain meaning of article 1.051 permits withdrawal of a waiver of counsel "at any time"

Article 1.051(h) provides that a defendant who has waived counsel and is representing himself may withdraw that waiver "at any time." TEX. CODE CRIM. PROC. art. 1.051(h). This should end the inquiry. The trial court erred by refusing to permit Huggins to withdraw his waiver of counsel. The court of appeals erred by upholding that decision.

In construing a statute, the Court seeks:

> to effectuate the "collective" intent or purpose of the legislators who enacted the legislation. We read the statute as a whole and give effect to the plain meaning of the statute's language, unless the statute is ambiguous or the plain meaning leads to absurd results. To determine plain meaning, we look to the statute's literal text and construe the words according to rules of grammar and usage. We presume that every word in a statute has been used for a purpose and that each word, clause, and sentence should be given effect if reasonably possible.

Hughitt v. State, 583 S.W.3d 623, 626-27 (Tex. Crim. App. 2019) (footnotes omitted); *accord McClintock*, 541 S.W.3d at 67.

If the statute's meaning is plain, the Court "look[s] no further." *McClintock*, 541 S.W.3d at 67 (quoting *State v. Daugherty*, 931 S.W.2d 268, 270 (Tex. Crim. App. 1996)). Here, the Court need "look no further."

Professors Dix and Schmolesky agree. GEORGE E. DIX. & JOHN M. SCHMOLESKY, TEXAS PRACTICE SERIES: CRIMINAL PRACTICE AND PROCEDURE § 29:21 (3d ed. 2011) (citing TEX. CODE CRIM. PROC. art. 1.051(h)) (the statute "draws no distinction between pretrial waivers and those made during trial").

Here, Huggins sought to withdraw his waiver of counsel early in the trial process at the commencement of voir dire. Article 1.051(h) plainly and unambiguously granted Huggins the right to withdraw his waiver of counsel "at any time."

D. Applying the plain meaning does not lead to absurd consequences

Because the legislature incorporated restrictions for withdrawal of a waiver of counsel, permitting a defendant to withdraw a waiver "at any time" does not lead to absurd consequences.

First, when a defendant withdraws a waiver of counsel in this instance, article 1.051(h) forbids "repeat[ing] a proceeding previously held or waived solely on the grounds of the subsequent appointment or retention of counsel." TEX. CODE CRIM. PROC. art. 1.051(h). The legislature thus built in a procedural safeguard to prevent abuse of the statutory right to withdraw a waiver of counsel. A defendant may withdraw the waiver of counsel at any

point in the proceedings, but counsel can only represent the defendant from that point forward and may not seek to backtrack or repeat any prior phase of the proceedings.

For example, a defendant may choose to withdraw the waiver of counsel when the State calls an expert witness whom the defendant does not feel equipped to cross-examine. The statute permits the defendant to withdraw the waiver at that time, but the State will not be required to recall any witness who testified earlier in the proceeding.

And second, the statute affords a trial court discretion when a defendant withdraws a waiver of counsel to permit appointed counsel 10 days to prepare before resuming proceedings. *Id.*

The legislature has thus enacted some restrictions on a defendant's statutory right to withdraw a waiver of counsel. But courts may not engraft additional restrictions on this statute. *See McClintock*, 541 S.W.3d at 66 ("we are not free to graft additions or alterations to the statute at our pleasure, in the name of policy, that are plainly inconsistent with the text"). Unfortunately, this is what the court below and others have done.

E. *Faretta* restrictions do not apply to article 1.051(h)

The court below and several others have erroneously engrafted restrictions developed under *Faretta* on the article 1.051(h) right to withdraw a waiver of counsel. The Court's analysis in *McClintock* demonstrates that this is error.

It all started with the Amarillo Court's decision in *Medley* which dealt solely with the Sixth Amendment right of self-representation under *Faretta*. That court confronted the issue of when a defendant who has chosen to represent himself after being duly admonished may withdraw his waiver of the right to counsel under the **Sixth Amendment**. The court made clear that it was addressing only the Sixth Amendment right to counsel. *Medley v. State*, 47 S.W.3d 17, 24 n.4 (Tex. App.—Amarillo 2000, pet. ref'd).

The court relied on this Court's decision in *Marquez* where the Court established requirements for withdrawal of a jury waiver. *Id.* at 24 (citing *Marquez v. State*, 921 S.W.3d 217, 223 (Tex. Crim. App. 1996)). The Amarillo Court thus held that a defendant representing himself may only withdraw his waiver of counsel by doing so "sufficiently in advance of trial" and by showing "that granting the request will not: (1) interfere with the orderly administration of the business of the court, (2) result in unnecessary delay or

inconvenience to witnesses, or (3) prejudice the State." *Id.*; *accord Jordan v. State*, No. 08-05-00286-CR, 2007 WL 1513996, at *5-6 (Tex. App.—El Paso May 24, 2007, pet. ref'd) (not designated for publication).

But the *Medley* factors should not apply to withdrawal of a waiver of counsel under article 1.051(h) for at least three reasons. First, the Amarillo Court was addressing a withdrawal of a waiver of counsel under the Sixth Amendment rather than article 1.051(h). And no case law had emerged at that point considering or defining restrictions on the withdrawal of this constitutional right.

Second, the legislature has defined in plain language the relevant restrictions on the withdrawal of a waiver of counsel under the statute. Courts may not engraft additional restrictions on this statutory right. *See McClintock*, 541 S.W.3d at 66.

And third, while article 1.13[3] addresses at length the steps a criminal defendant must take to waive the right to jury trial, the legislature has not spoken to how (or if) a defendant may withdraw that waiver or what restrictions may apply to such a withdrawal. *See Marquez*, 921 S.W.2d at 220.

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[3] TEX. CODE CRIM. PROC. art. 1.13.

This Court thus filled the gap and answered those questions. The Court did so by reviewing decisions from other states then holding that: (1) a withdrawal of a jury waiver "is addressed to the discretion of the trial court" and (2) the defendant must show that withdrawal of the waiver is in good faith and will cause "no adverse consequences." *Id.* at 220-22.

The Court identified factors (later adopted by the court in *Medley*) that are relevant to the issue of whether withdrawal of a jury waiver causes "adverse consequences." *Id.* at 223.

Application of the "*Marquez* factors" to the withdrawal of a Sixth Amendment waiver of counsel makes good sense because both involve the withdrawal of a waiver of a constitutional right. But the *Marquez* factors have no application to withdrawal of a waiver under article 1.051(h) because the legislature has clearly and unambiguously defined how and when such a waiver may occur.

Nevertheless, the court below and several others have discussed the *Medley*/*Marquez* factors in connection with article 1.051(h).

The Ninth Court apparently blended its discussion of *Medley* and article 1.051(h) where a defendant challenged a trial court's denial of his withdrawal of a prior waiver of the right to counsel under the **Sixth**

Amendment. *Glover v. State*, No. 09-06-00325-CR, 2007 WL 5442525, at *6-7 (Tex. App.—Beaumont Aug. 27, 2008, no pet.) (mem. op., not designated for publication). The court quoted article 1.051(h) then cited *Medley* and other cases for the proposition that a trial court may deny withdrawal of a waiver of counsel when doing so would obstruct the administration of justice. *Glover*, 2007 WL 5442525, at *6; *accord Magness v. State*, No. 01-08-00742-CR, 2010 WL 2431067, at *3-5 (Tex. App.—Houston [1st Dist.] June 17, 2010, pet. ref'd) (mem. op., not designated for publication). This was a correct statement about the **Sixth Amendment** right to counsel but has no bearing on article 1.051(h).

The Second Court was the first to expressly hold that the statutory right to withdraw a waiver of counsel is subject to the limitations announced in Medley. *Lewis v. State*, No. 02-12-00246-CR, 2014 WL 491746, at *3 (Tex. App.—Fort Worth Feb. 6, 2014) (mem. op., not designated for publication), *pet. dism'd, improvidently granted*, No. PD-307-14, 2015 WL 1759459 (Tex. Crim. App. 2015). The court did not address the statutory language that a defendant may withdraw a waiver of counsel "at any time."

The court below agreed with the reasoning of *Lewis* that these limitations apply to the statutory right to withdraw a waiver of counsel.

Huggins v. State, No. 10-19-00096-CR, 2021 WL 2827931, at *4-5 (Tex. App.—Waco July 7, 2021, pet. filed) (mem. op., not designated for publication).

F. Only the First Court has properly applied the plain meaning

The First Court appears to be the only intermediate court to have correctly applied the plain meaning of article 1.051(h) that a defendant may withdraw a waiver of counsel "at any time."

In *Walker*, after a pro se defendant was convicted by a jury, he asked the trial court to allow him to withdraw his waiver of counsel and permit stand-by counsel to represent him in the sentencing phase. *See Walker v. State*, 962 S.W.2d 124, 127 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd). The trial court refused. *Id.*

The First Court held that this was error because article 1.051(h) permits a defendant to withdraw his waiver "at any time." *Id.* (citing TEX. CODE CRIM. PROC. art. 1.051(h)).

This Court should construe article 1.051(h) by its plain meaning like the First Court did in *Walker*. The Court should also resolve the conflict between *Walker* and the other cases cited. *See* TEX. R. APP. P. 66.3(a).

G. The court below erred by failing to apply the plain meaning

The plain language of article 1.051(h) permits a pro-se defendant to withdraw his prior waiver of counsel "at any time." The court below erred by failing to apply the plain meaning of the statute and by upholding the trial court's refusal to follow the statute.

Huggins recognizes that this Court generally does not perform a harm analysis in the first instance. However, the Court occasionally does. *E.g.*, *McDonald v. State*, 179 S.W.3d 571, 578-79 (Tex. Crim. App. 2005). Huggins encourages the Court to do so here. *See id.* at 580 (Cochran, J., concurring) (court should conduct harm analysis "when the record clearly demonstrates that the error is obviously either harmful or harmless"); *accord Maciel v. State*, ___ S.W.3d ___, 2021 WL 4566518, at *4 (Tex. Crim. App. Oct. 6, 2021) (Newell, J., concurring) ("this Court should feel free . . . to address the question of whether a particular error harmed the defendant"). Here, the error is "obviously harmful."

Because this was statutory error, the harm analysis of Rule 44.2(b) applies. Such error must be disregarded unless it affects the appellant's substantial rights. TEX. R. APP. P. 44.2(b).

> In considering the potential to harm, the focus is not on whether the outcome of the trial was proper despite the error, but whether the error had a substantial or injurious effect or influence on the jury's verdict. A conviction must be reversed for non-constitutional error if the reviewing court has grave doubt that the result of the trial was free from the substantial effect of the error. "Grave doubt" means that "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." "[I]n cases of grave doubt as to harmlessness the petitioner must win."

Barshaw v. State, 342 S.W.3d 91, 93-94 (Tex. Crim. App. 2011) (quoting *Schutz v. State*, 63 S.W.3d 442, 444 (Tex. Crim. App. 2001); *Burnett v. State*, 88 S.W.3d 633, 637-38 (Tex. Crim. App. 2002)) (footnotes omitted) (other citations omitted).[4]

The trial court's erroneous refusal to accept Huggins's withdrawal of his prior waiver of counsel amounted to a denial of his right to counsel. This denial, even if not a constitutional violation, affected Huggins's substantial rights.

The refusal to accept the withdrawal and concomitant denial of counsel deprived Huggins of the right to consult with counsel in deciding whether to proceed with his decision to plead guilty. This refusal ultimately

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[4] The "grave doubt" standard is derived from federal law. *See O'Neal v. McAninch*, 513 U.S. 432, 436 (1995).

means that he did not knowingly, intelligently and voluntarily enter his guilty plea.

The refusal to accept the withdrawal and concomitant denial of counsel deprived Huggins of the right to consult with counsel when the State sought to obtain his fingerprints at the beginning of the sentencing phase.

And finally, the refusal to accept the withdrawal and concomitant denial of counsel deprived Huggins of the right to representation of counsel during the sentencing phase.

For each of these reasons, the trial court's erroneous refusal to accept Huggins's withdrawal of his prior waiver of counsel affected his substantial rights.

At minimum, the Court should harbor grave doubts as to whether the error affected his substantial rights. *See Barshaw*, 342 S.W.3d at 93-94.

Either way, reversal is required.

H. This Court should reverse and remand

The court below erred by applying the *Medley/Marquez* factors to Huggins's withdrawal of his waiver of counsel under article 1.051(h). Huggins urges the Court to conduct a harm analysis and hold that the erroneous denial of his right to withdraw the waiver of counsel affected his

substantial rights. On so holding, the Court should reverse the judgment of the court of appeals and remand this cause to the trial court for a new trial. *See* TEX. R. APP. P. 78.1(d); *Martinez v. State*, 620 S.W.3d 734, 744-45 (Tex. Crim. App. 2021).

Alternatively, this Court should reverse the judgment of the court of appeals and remand this cause to that court for a harm analysis. *See* TEX. R. APP. P. 78.1(d); *Maciel*, 2021 WL 4566518, at *4.

2. What admonishments does *Faretta* (or article 1.051) require for a defendant who initially contests guilt but later pleads guilty?

Faretta held that, when a defendant chooses to exercise the right of self-representation, a trial court must admonish the defendant about the dangers and disadvantages of self-representation. This Court later held that *Faretta* admonishments are not required when a pro se defendant does not contest his guilt. The Supreme Court has more recently adopted a "pragmatic approach" for determining what *Faretta* admonishments must be given in a particular proceeding.

Here, at the time Huggins waived his right to counsel, he was contesting his guilt. The trial court thus should have fully admonished him of the dangers and disadvantages of self-representation. The court below erred by holding otherwise.

A. *Faretta* requires admonishments on the record about dangers and disadvantages of self-representation

Faretta recognized the Sixth Amendment right of self-representation and held that a pro se defendant must "competently and intelligently . . . choose self-representation." *Faretta*, 422 U.S. at 835. To accomplish this, a court must make a defendant "aware of the dangers and disadvantages of self-representation." *Id.*

Article 1.051(g) similarly requires a trial court to advise a pro-se defendant who "is proceeding to trial [of] the dangers and disadvantages of self-representation." TEX. CODE CRIM. PROC. art. 1.051(g). The legislature presumably took this language directly from *Faretta* when enacting the statute. *See Burgess v. State*, 816 S.W.2d 424, 431 n.3 (Tex. Crim. App. 1991) ("we must presume that in enacting Article 1.051(g), supra, the Legislature intended to accommodate the Sixth Amendment right to self-representation"). Huggins suggests that the admonishments of "dangers and disadvantages" required by *Faretta* are identical to those required by article 1.051(g).

Further, these admonishments must appear in the record. *Collier v. State*, 959 S.W.2d 621, 626 n.8 (Tex. Crim. App. 1997) ("The record must reflect that the trial court thoroughly admonished the defendant."); *Johnson v. State*, 760 S.W.2d 277, 279 (Tex. Crim. App. 1988) ("Generally, the record must be sufficient for the reviewing court to make an assessment that appellant knowingly exercised his right to defend himself.").[5]

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[5] This appears to be a category-one or –two right under the *Marin* formulation. *See Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993). It seems more appropriate to treat this as a category-one right (an absolute requirement) because a category-two right is waivable. *Id.* But it strains credulity to believe a pro-se defendant would even be aware

This is so because the Supreme Court held in *Faretta* that a pro-se defendant must be advised of the dangers and disadvantages of self-representation "so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' " *Faretta*, 422 U.S. at 835 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)).

B. *Faretta* admonishments should establish that a pro-se defendant is proceeding with eyes open in choosing to waive counsel

This Court has explained on several occasions the nature of the admonishments that must be given regarding the dangers and disadvantages of self-representation. No specific formula or script is required. *Blankenship v. State*, 673 S.W.2d 578, 583 (Tex. Crim. App. 1984).

> On the other hand, *Faretta* does not authorize trial judges across this state to sit idly by doling out enough legal rope for defendants to participate in impending courtroom suicide; rather, judges must take an active role in assessing the defendant's waiver of counsel.
>
> > "A judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the

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of the need for a record and possess the requisite knowledge to knowingly waive that right. Regardless, Huggins did not waive the right to a record.

> nature of the charges, the statutory offenses included within them, the range of allowable punishments, thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which a plea is tendered."

Id. (quoting *Von Moltke v. Gillies*, 332 U.S. 708, 723 (1948)).

But the Court retreated somewhat from this recommendation for an extensive inquiry a few years later.

> Admonishments of defendants who wish to proceed pro se should include an effort to ensure that the defendant is aware of the practical disadvantages of representing himself. The defendant should be aware that there are technical rules of evidence and procedure, and he will not be granted any special consideration solely because he asserted his pro se rights.

Johnson v. State, 760 S.W.2d 277, 279 (Tex. Crim. App. 1988).

Ultimately, *Faretta* requires a trial court to make a pro se defendant "aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' " *Faretta*, 422 U.S. at 835 (quoting *Adams*, 317 U.S. at 279); *Johnson*, 760 S.W.2d at 278 (same).

And article 1.051(g) requires the same for any pro-se defendant who "is proceeding to trial." TEX. CODE CRIM. PROC. art. 1.051(g); *see Burgess*, 816 S.W.2d at 431 n.3.

C. Less extensive admonishments may satisfy *Faretta* in proceedings other than a trial on the merits

This Court concluded 40 years ago that *Faretta* admonishments are not required for a pro se defendant who does not contest his guilt. *Johnson v. State*, 614 S.W.2d 116, 119 (Tex. Crim. App. 1981) (op. on reh'g).

The legislature apparently took note of this decision some 26 years later and amended article 1.051(g) to provide that a trial court need only "advise the defendant of the nature of the charges against the defendant" if the defendant represents himself and pleads guilty. Act of May 17, 2007, 80th Leg., R.S., ch. 463, § 1, 2007 Tex. Sess. Law Serv. 822, 822-23.[6]

This Court reaffirmed *Johnson* about 20 years ago in an appeal from a misdemeanor revocation. *Hatten v. State*, 71 S.W.3d 332, 334 (Tex. Crim. App. 2002). Judge Johnson concurred, and Judge Price dissented.

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[6] Originally, article 1.051(g) drew no distinction between defendants who pleaded guilty and those who contested their guilt. *See* Act of May 30, 1987, 70th Leg., R.S., ch. 979, § 1, 1987 Tex. Gen. Laws 3321, 3321-22 (amended 2001). The statute simply provided, "If a defendant desires to waive his right to counsel, the court shall advise him of the dangers and disadvantages of self-representation." *Id.*

Judge Johnson expressed concern about limiting the *Faretta* admonishments to those who contest guilt. *Id.* at 335 (Johnson, J., dissenting).

> Whether couched in terms of "not guilty" or "not true," the decision whether to contest guilt is often one that is better made with the assistance of counsel. It is therefore incumbent upon the judicial system to ensure that the decision to forego counsel is made based upon sufficient information and understanding. Texas grants to defendants the right to have counsel at revocation hearings. That right is no less important when the defendant chooses not to contest guilt than when he does, and the importance increases as the potential sentence increases.

Id.

Judge Price dissented because, in his words, the Court granted review to address a conflict among the intermediate courts regarding whether *Faretta* admonishments are required when a defendant pleads guilty; the appellant had specifically asked the Court to "review the continuing vitality of *Johnson*"; but the majority declined the request. In his view, "[t]he majority's analysis [was] incomplete and inadequate." *Id.* (Price, J., dissenting).

Meanwhile, the Supreme Court revisited the *Faretta* admonishments shortly after *Hatten*. The Court concluded that "a less searching or formal colloquy may suffice" in proceedings other than a trial on the merits. *Tovar*, 541 U.S. at 89 (quoting *Patterson v. Illinois*, 487 U.S. 285, 298 (1988)).

In *Tovar*, the Court addressed the admonishments required by *Faretta* for a pro-se defendant who pleads guilty to a misdemeanor. The Iowa Supreme Court held that a court must advise such a defendant "of the usefulness of an attorney and the dangers of self-representation." *State v. Tovar*, 656 N.W.2d 112, 121 (Iowa 2003).

> [T]he trial judge need only advise the defendant generally that there are defenses to criminal charges that may not be known by laypersons and that the danger in waiving the assistance of counsel in deciding whether to plead guilty is the risk that a viable defense will be overlooked. The defendant should be admonished that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty. In addition, the court must ensure the defendant understands the nature of the charges against him and the range of allowable punishments.

Id.

The Supreme Court rejected this approach. Instead, the Court adopted the more "pragmatic approach" it employed in *Patterson*[7] that asks "what purposes a lawyer can serve at the particular stage of the proceedings in

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[7] *Patterson* involved the related question of what warnings must be given to a defendant during post-indictment interrogation regarding the Sixth Amendment right to counsel. *See Patterson v. Illinois*, 487 U.S. 285, 292 (1988).

question, and what assistance he could provide to an accused at that stage." *Tovar*, 541 U.S. at 90 (quoting *Patterson*, 487 U.S. at 298). This pragmatic framework enables a court "to determine the scope of the Sixth Amendment right to counsel, and the type of warnings and procedures that should be required before a waiver of that right will be recognized." *Id.* (same).

The Court observed in *Patterson* (and repeated in *Tovar*) that the importance of counsel at trial can be significant because of the nature of the proceedings. "[A]t trial, counsel is required to help even the most gifted layman adhere to the rules of procedure and evidence, comprehend the subtleties of voir dire, examine and cross-examine witnesses effectively (including the accused), object to improper prosecution questions, and much more." *Patterson*, 487 U.S. at 300 n.13 (quoted by *Tovar*, 541 U.S. at 89).

The Court concluded that, for a pro-se defendant pleading guilty, it is sufficient if the trial court "informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea." *Tovar*, 541 U.S. at 81.

D. Texas cases appear to conflict with *Faretta*

The Supreme Court did not wholly dispense with *Faretta*'s admonishment requirement for proceedings other than a trial on the merits. *Hatten* and *Johnson* thus appear to conflict with the pragmatic approach adopted in *Tovar*.

This Court held in *Johnson* that *Faretta* simply does not apply to a defendant who pleads guilty and does not contest his guilt. *Johnson*, 614 S.W.2d at 119 ("the principles of law announced in *Faretta* are as far removed from this case as is the State of California from our own state"). The Court reiterated in *Hatten* that "[t]he requirements of *Faretta* are not invoked by a misdemeanor defendant who waives his right to representation by counsel and does not contest his guilt." *Hatten*, 71 S.W.3d at 334.

These pronouncements directly contradict the holding of *Tovar*.

There, the Supreme Court recognized that the Sixth Amendment right to counsel applies to a plea hearing because it is a "critical stage" of the criminal process. *Tovar*, 541 U.S. at 87. The Court further held that, as part of this Sixth Amendment right, a pro se defendant must be admonished in accordance with *Faretta* though to a lesser extent than a pro-se defendant commencing a trial on the merits. *See id.* at 89-91.

This Court should thus overrule *Johnson* and *Hatten* to the extent they stand for the proposition that *Faretta* does not apply to pro-se defendants who plead guilty rather than represent themselves at trial.

At bottom, though these decisions appear to conflict with *Tovar*, it is arguably a distinction without a difference.

When the Court applies *Tovar*'s pragmatic approach to a pro-se defendant who pleads guilty to a **felony**, the information required by *Tovar* should be conveyed to the defendant as a matter of Texas law.

First, *Tovar* requires that the court admonish such a defendant regarding "the nature of the charges against him." *Tovar*, 541 U.S. at 81. Article 1.051(g) requires the same for a pro-se defendant who pleads guilty. TEX. CODE CRIM. PROC. art. 1.051(g).

Second, the court must admonish the defendant "of his right to be counseled regarding the plea." *Tovar*, 541 U.S. at 81. Article 1.051(g) arguably requires the same because it requires that a waiver of counsel reflect that a pro-se defendant has been advised of the "right to representation by counsel." TEX. CODE CRIM. PROC. art. 1.051(g). However, a noticeable gap exists between generally advising a pro-se defendant that he has a "right to

representation by counsel" and more specifically advising him of the right to the advice of counsel "regarding the plea [he intends to enter]."

Lastly, the court must admonish a pro-se defendant regarding the range of punishment. *Tovar*, 541 U.S. at 81. Article 26.13(a)(1) requires the same for a defendant who pleads guilty to a felony. TEX. CODE CRIM. PROC. art. 26.13(a)(1). But article 26.13 does not apply to misdemeanors. *State v. Guerrero*, 400 S.W.3d 576, 589 (Tex. Crim. App. 2013) ("we have repeatedly stated, that article [26.13] does not apply to misdemeanor cases").

Johnson and *Hatten* conflict with *Tovar* and should be overruled. Although articles 1.051(g) and 26.13(a)(1) fill the gaps created by *Johnson* and *Hatten* to a limited extent, they do not completely fill these gaps, particularly for misdemeanor defendants.

This Court should confirm that the constitutional floor set by *Tovar* applies to all pro-se defendants who plead guilty in Texas to felony or misdemeanor charges.

E. The scope of admonishments is fixed at the time counsel is waived

The court below determined what admonishments should be required in a post hoc fashion based on what happened on the day of trial. But *Faretta* and its progeny establish that the scope of admonishments is fixed at the

time the pro-se defendant waives counsel. This is so because the *Faretta* admonishments are designed to ensure that a pro-se defendant's "choice [to waive counsel] is made with eyes open." *Faretta*, 422 U.S. at 835 (quoting *Adams*, 317 U.S. at 279); *Johnson*, 760 S.W.2d at 278 (same).

Tovar procedurally is very similar to *Johnson* and *Hatten* in that it appears the defendants announced at arraignment (their first appearance in court) that they would not contest guilt and wanted to plead guilty (or true to a revocation motion). *See Tovar*, 541 U.S. at 82-83; *Hatten*, 71 S.W.3d at 333; *Johnson*, 614 S.W.2d at 120.

The "pragmatic approach" suggested by *Tovar* implies a granulated approach to each stage of prosecution that requires a trial court to consider:

> "what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage," in order "to determine the scope of the Sixth Amendment right to counsel, and the type of warnings and procedures that should be required.

Tovar, 541 U.S. at 90 (quoting *Patterson*, 487 U.S. at 298).

This statement makes sense in the context of a defendant who appears in court and informs the court without hesitance that he wants to plead guilty but not in other contexts. If *Tovar* is strictly followed in this regard, it

would suggest that new admonishments are required at every hearing that a pro-se defendant attends. This seems untenable.

The Court went on to state that "less rigorous" admonishments are required at a pretrial proceeding. "We require less rigorous warnings pretrial, *Patterson* explained, not because pretrial proceedings are 'less important' than trial, but because, at that stage, 'the full dangers and disadvantages of self-representation . . . are less substantial and more obvious to an accused than they are at trial.' " *Id.* (quoting *Patterson*, 487 U.S. at 299). This is a problematic statement as discussed below. *Tovar* and *Patterson* should be limited to their procedural scenarios.[8]

The pretrial phase of a criminal prosecution involves significant procedural issues that directly impact how (or if) a contested criminal case proceeds to a trial on the merits. This begins with the discovery process established by the Michael Morton Act as well as the State's compliance with any *Brady* requirements. The State has no burden to furnish discovery unless

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[8] Tovar should also be distinguished because it was a collateral attack on the defendant's misdemeanor conviction. *See Iowa v. Tovar*, 541 U.S. 77, 92 (2004).

requested. *See* TEX. CODE CRIM. PROC. art. 39.14(a). The same is true for expert disclosures under article 39.14(b). *Id.* art. 39.14(b).

Additionally, a defendant must submit certain pretrial requests for notice of the State's intent to introduce extraneous-conduct evidence under Rules 404(b) and 609(f) and under various statutes including, but not limited to, articles 38.36, 38.37, 38.371 and 37.07.[9] *See* TEX. CODE CRIM. PROC. arts. 38.36; 38.37, § 3; 38.371; 37.07, § 3(g); TEX. R. EVID. 404(b)(2), 609(f).

If the facts warrant, a defendant may seek to suppress certain evidence that could result in dismissal of the case if he succeeds.

In many cases, a defendant must file any pretrial motions at least 7 days before the scheduled pretrial hearing, or they are waived. *See* TEX. CODE CRIM. PROC. art. 28.01, § 2.

An eligible defendant must file a pretrial application for community supervision or that sentencing option will not be available. *Id.* art. 37.07, § 2(b).

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[9] Although article 38.36 and 38.371 do not have specific notice requirements, courts have consistently held that the notice provisions of Rule 404(b)(2) apply to article 38.36. *E.g. Umoja v. State*, 965 S.W.2d 3, 7 (Tex. App.—Fort Worth 1997, no pet.); *Hernandez v. State*, 914 S.W.2d 226, 234-35 (Tex. App.—Waco 1996, no pet.). These requirements presumably likewise apply to article 38.371.

And if a defendant does not file a proper pretrial election, he will be denied his statutory right to jury sentencing. *Id.* art. 37.07, § 2(b).

These are but several examples of the procedural complexities that apply during the pretrial phase of a criminal prosecution. Counsel does not suggest that a trial court has a constitutional obligation to admonish a pro-se defendant regarding every one of these matters. But, at minimum, a defendant who indicates at a pretrial hearing that he desires to waive counsel and further indicates that he intends to contest guilt and have a trial on the merits should be admonished as this Court suggested in its 1988 *Johnson* decision, or better still, as suggested in *Blankenship*.

Huggins does not expect this Court to furnish a particular script, but the Court should at minimum confirm what it said in these prior decisions or otherwise provide a summary of the kinds of admonishments a trial court must furnish a defendant in this situation.

3. Did the court below correctly conclude that no *Faretta* admonishments were required where Appellant initially contested his guilt?

This Court has held on at least 2 occasions that *Faretta* does not apply to a defendant who pleads guilty. These decisions appear inconsistent with the Supreme Court's decision in *Tovar*. Further, the scope of admonishments depend on whether the defendant is contesting guilt at the time he waives his right to counsel. Because Huggins was contesting guilt when he waived counsel, the court below erred by holding that no admonishments were required.

A. The scope of admonishments is fixed at the time counsel is waived

The court below focused on what happened on the day of trial to determine what admonishments were required by *Faretta*. *See Huggins*, 2021 WL 2827931, at *2. This post hoc approach was error as already explained.

Faretta requires admonishments to ensure that a pro-se defendant's "choice [to waive counsel] is made with eyes open." *Faretta*, 422 U.S. at 835 (quoting *Adams*, 317 U.S. at 279); *Johnson*, 760 S.W.2d at 278 (same).

Therefore, the scope of admonishments that must be provided is determined by the nature and circumstances of the proceeding at which the

defendant chooses to proceed pro-se and waive his right to counsel—not at some later date.

B. Huggins was contesting guilt when he waived counsel

Huggins appeared with appointed counsel at a pretrial hearing just over a month before trial at which time counsel advised the trial court that Huggins wanted to represent himself. (3RR4) Huggins gave no indication at this pretrial proceeding that he intended to plead guilty. Rather, all indications were that he wanted a contested trial on the merits. (3RR4-7)

Accordingly, the trial court should have furnished Huggins an extensive *Faretta* admonishment about the dangers and disadvantages of proceeding to trial without counsel. *E.g. Johnson*, 760 S.W.2d at 279; *Blankenship*, 673 S.W.2d at 583.

Because *Faretta* admonishments were required at the time Huggins waived counsel, the court below erred by applying a post hoc approach to determine that no such admonishments were required because of what happened in a proceeding conducted over a month later than the proceeding at which Huggins decided to waive counsel and represent himself.

C. The trial court wholly failed to admonish Huggins

When Huggins confirmed to the trial court that he desired to represent himself, the court required merely that he sign a waiver of counsel. The court wholly failed to admonish him about the dangers and disadvantages of self-representation.

When Huggins told the trial court he wanted to represent himself, the trial court simply advised him that, if he signed a waiver of counsel, then the court would allow him to represent himself.[10] (3RR4) The court did not admonish him in any fashion about the dangers and disadvantages of self-representation.

However, the written waiver of counsel that Huggins signed does make reference to unspecified "dangers and disadvantages of self-representation." The waiver provides in relevant part:

> On this the 7 day of Feb, 2019, l have been advised by the above named Court of the following:
>
> (l) The right to represent myself in a criminal proceeding and the dangers and disadvantages of self-representation;

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[10] The trial court had followed a similar process at Huggins's arraignment 2 years earlier when Huggins informed the court that he wanted to represent himself. (2SRR5-8) The court did not admonish him about the dangers and disadvantages of self-representation then either.

. . . .

> I further acknowledge that I have been fully advised of the right to counsel for purposes of entering a guilty plea or proceeding to trial, and the Court has advised me of the nature of the charges against me and, if I desire to proceed to trial, the dangers and disadvantages of self-representation. I further acknowledge that the court has provided me with a statement substantially in the following form, which, if signed by the defendant, shall be filed with and become a part of the record of the proceedings:
>
> "I have been advised this 7 day of Feb 2019, by the 66th District, County Court at Law or County Court of Hill County, Texas as applicable of my right to representation by counsel in the case pending against me. I have been further advised that if I am unable to afford counsel, one will be appointed for me free of charge. Understanding my right to have counsel appointed for me free of charge if I am not financially able to employ counsel, I wish to waive that right and request the Court to proceed with my case without an attorney being appointed to me. I hereby waive my right to counsel."

(CR12-13)

The Court applies a presumption of regularity to any document in the record. *See Jones v. State*, 77 S.W.3d 819, 822 (Tex. Crim. App. 2002); *Breazeale v. State*, 683 S.W.2d 446, 450 (Tex. Crim. App. 1985) (op. on reh'g). This means that any recitals in a document in the record are presumed to be correct, and an appellant bears the burden of proving otherwise. *Guerrero*, 400 S.W.3d at 582 & n.15; *Breazeale*, 683 S.W.2d at 450. The presumption of regularity may

be overcome when the record affirmatively reflects that a recital is incorrect. *See id.* Here, the record directly refutes any presumption of regularity that attaches to the boilerplate recitals in the waiver of counsel that the trial court admonished Huggins about the dangers and disadvantages of self-representation.

The colloquy between the trial court and Huggins reflects that:

1) Huggins stated that he wanted to represent himself (3RR4);

2) the trial court advised him that, if he signed a waiver of counsel, he could represent himself (3RR4);

3) the trial court advised him that it was unlikely to grant a continuance of the trial setting which was a little over a month later (3RR4-6);

4) the trial court advised him that he could file any pretrial motions he deemed necessary (3RR6-7);

5) the trial court gave Huggins a written waiver of counsel to sign (3RR6);

6) a brief pause in the proceedings occurred while Huggins presumably read the waiver of counsel (3RR6);

7) Huggins delivered the signed waiver to the court (3RR6); and

8) the trial court allowed him to represent himself from that point forward. (3RR6)

The record thus makes clear that the trial court never admonished Huggins about the dangers and disadvantages of self-representation.

Further, the trial court wholly failed to comply with the directives of this Court that *Faretta* admonishments appear in the record. *See Collier*, 959 S.W.2d at 626 n.8; *Johnson*, 760 S.W.2d at 279.

Accordingly, the record affirmatively demonstrates that the trial court failed to admonish Huggins about the dangers and disadvantages of self-representation as he prepared for a contested jury trial.

D. The court below erred by excusing the trial court from compliance with *Faretta*

As explained, the scope of admonishments required by *Faretta* is determined at the time a defendant informs the trial court that he desires to waive his right to counsel and represent himself.

All indications at the pretrial hearing where Huggins waived counsel were that he intended to have a contested trial on the merits. The trial court thus should have fully admonished him under *Faretta*.

However, the court below looked at what happened over a month later when Huggins pleaded "guilty" to the jury. This post hoc approach does not satisfy *Faretta*.

Further, a trial court's error in failing to admonish under *Faretta* is not the sort of error that can be "rendered harmless" because a pro-se defendant

makes the uncounseled decision weeks after waiving counsel to plead guilty. *Cf. Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998). A trial court's failure to ensure that a pro-se defendant has waived counsel with his "eyes open" to the dangers and disadvantages that waiver poses necessarily calls into question the validity of any subsequent actions taken by the pro-se defendant.

E. *Faretta* error is structural error not subject to a harm analysis

A failure to comply with *Faretta* is structural error not amenable to a harm analysis that "requires automatic reversal." *Williams v. State*, 252 S.W.3d 353, 357-59 (Tex. Crim. App. 2008).

Accordingly, the Court should reverse the judgment of the court of appeals and remand this cause to the trial court for a new trial. *See* TEX. R. APP. P. 78.1(d); *Martinez*, 620 S.W.3d at 744-45.

Prayer

WHEREFORE, PREMISES CONSIDERED, Appellant Noel Christopher Huggins asks the Court to: (1) reverse the judgment of the court of appeals and remand this cause to the trial court for a new trial; (2) reverse the judgment of the court of appeals and remand for a harm analysis; and (3) grant such other and further relief to which he may show himself justly entitled.

Respectfully submitted,

/s/ Alan Bennett
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Certificate of Compliance

The undersigned hereby certifies, pursuant to Rule of Appellate Procedure 9.4(i)(3), that this computer-generated document contains 11,169 words.

/s/ Alan Bennett
E. Alan Bennett

Certificate of Service

The undersigned hereby certifies that a true and correct copy of this brief was served electronically on October 29, 2021 to:

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/s/ Alan Bennett
E. Alan Bennett

Optional Appendix

Cause No. F071-17

STATE OF TEXAS	§	IN THE 66TH JUDICIAL
VS.	§	DISTRICT COURT
	§	OR COUNTY COURT AT LAW OR COUNTY COURT (circle one as applicable)
Noel Christopher Aguirre		HILL COUNTY, TEXAS

FILED
ANGELIA ORR DISTRICT CLERK
HILL COUNTY, TX
FEB -7 P 2:14

WAIVER OF COUNSEL

On this the 7 day of Feb, 2019, I have been advised by the above named Court of the following:

(1) The right to represent myself in a criminal proceeding and the dangers and disadvantages of self-representation; and

(2) My right to representation by counsel in the trial of the charge pending against me. I have been further advised that if I am unable to afford counsel, one will be appointed for me free of charge, save and except that, if the Court determines I have sufficient financial resources, the Court shall order me to pay all or part of the legal services provided, including expenses and costs.

I fully understand my rights in (1) and (2) above and, having no further questions about them, I hereby knowingly and intelligently waive (2) above; my right to representation by counsel, and request the Court to proceed with my case without an attorney being appointed for me.

I hereby waive my right to counsel.

Per HB 1178, effective September 1, 2007, I further acknowledge that if I am an indigent defendant who has refused appointed counsel in order to retain private counsel and then appear without counsel and after I have been given an opportunity to retain counsel, which I acknowledge, if applicable, that the court, after giving me a reasonable opportunity to request appointment of counsel or, if I have elected not to request appointment of counsel, after obtaining a waiver of the right to counsel pursuant to law, understand that I may proceed with the matter on 10 days' notice to the defendant of a dispositive setting, all of which I acknowledge. I further acknowledge that I have had at least said 10 days notice and waive any claim of error regarding said notice.

I further acknowledge that the Court has advised me that the attorney representing the state may not:

1. initiate or encourage an attempt to obtain from me, if not represented by counsel, a waiver of the right to counsel; or

2. communicate with me if I have requested the appointment of counsel, unless the court or the court's designee authorized under Article 26.04 to appoint counsel for indigent defendants in the county has denied the request and, subsequent to the denial, the defendant:

a. has been given a reasonable opportunity to retain and has failed to retain private counsel; or

b. waives or has waived the opportunity to retain private counsel. I acknowledge I have been given such opportunity or make such waiver. I waive any claim of error regarding such opportunity(ies). I acknowledge that I have been advised by the Court that the court may not direct or encourage the defendant to communicate with the attorney representing the state until the court advises the defendant of the right to counsel and the procedure for requesting appointed counsel and the defendant has been given a reasonable opportunity to request appointed counsel. I further advise the Court has done all of those things to my satisfaction. I acknowledge the Court has further advised me that if the defendant has requested appointed counsel, the court may not direct or encourage the defendant to communicate with the attorney representing the state unless the court or the court's designee authorized under Article 26.04 to appoint counsel for indigent defendants in the county has denied the request and, subseqoent to the denial, the defendant:

1. has been given a reasonable opportunity to retain and has failed to retain private counsel; or

2. waives or has waived the opportunity to retain private counsel.

I further acknowledge that I have been fully advised of the right to counsel for purposes of entering a guilty plea or proceeding to trial, and the Court has advised me of the nature of the charges against me and, if I desire to proceed to trial, the dangers and disadvantages of self-representation. I further acknowledge that the court has provided me with a statement substantially in the following form, which, if signed by the defendant, shall be filed with and become a part of the record of the proceedings:

" I have been advised this 7 day of Feb 2019, by the 66th District, County Court at Law or County Court of Hill County, Texas as applicable of my right to representation by counsel in the case pending against me. I have been further advised that if I am unable to afford counsel, one will be appointed for me free of charge. Understanding my right to have counsel appointed for me free of charge if I am not financially able to employ counsel, I wish to waive that right and request the Court to proceed with my case without au attorney being appointed to me. I hereby waive my right to counsel."

I further advise that I have been advised that notwithstanding any other provisiou of this article, the judge or magistrate in whose court a criminal action is pending may not order the accused to be rearrested or require the accused to give another bond in a higher amount because the accused;

1. withdraws a waiver of the right to counsel; or
2. requests the assistance of counsel, appointed or retained.

Defendant

✓ APPROVED _____ DENIED:

Signed this the 7 day of Feb., 2019.

Judge Presiding

REVISED JULY 2015

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Vanessa Butler on behalf of E. Bennett
Bar No. 2140700
vbutler@slmpc.com
Envelope ID: 58674543
Status as of 11/2/2021 9:50 AM CST

Associated Case Party: Noel Huggins

Name	BarNumber	Email	TimestampSubmitted	Status
Edward Alan Bennett	2140700	abennett@slm.law	10/29/2021 1:12:08 PM	SENT

Associated Case Party: State of Texas

Name	BarNumber	Email	TimestampSubmitted	Status
Mark Frederick Pratt	16240550	mpratt@co.hill.tx.us	10/29/2021 1:12:08 PM	SENT
Matthew McGregor Boyle	24040556	mboyle@co.hill.tx.us	10/29/2021 1:12:08 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Margaret EmilyJohnson-Liu		information@spa.texas.gov	10/29/2021 1:12:08 PM	SENT